Supreme Court, U.S.
FILED
AUG 1 1958
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958.

No. 243

MEYER FIELD,

Petitioner,

vs.

NUGENT R. OBERWORTMANN AND V. W. BECKING,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT.

MEYER FIELD, *pro se* and
LEONARD L. COWAN,
188 West Randolph Street,
Chicago 1, Illinois,
Counsel for Petitioner.

INDEX.

Subject Index.

	PAGE
Petition for a Writ of Certiorari to the Appellate Court of Illinois, First District	1
Opinions Below	1
Jurisdiction	2
Question Presented	2
Statement of Case	2
Specifications of Errors to Be Urged	8
Reasons for Granting the Writ	9
Conclusion	17

Table of Cases Cited.

Bowerman v. Hammer, 250 U. S. 504	12
Jones National Bank v. Yates, 240 U. S. 541	11
Lewis v. United States, 22 Fed. 2d 760	15
Yates v. Jones National Bank, 206 U. S. 158	11

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958.

No. .....

MEYER FIELD,

Petitioner,

vs.

NUGENT R. OBERWORTMANN AND V. W. BECKING,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT.

The Petitioner, Meyer Field, who was the plaintiff in this cause, prays that a writ of certiorari issue to review the judgment of the Appellate Court of Illinois, First District, from which judgment leave to appeal was denied by the Supreme Court of Illinois. The judgment denies a writ of mandamus to the plaintiff who sought to make the minutes of a national bank board of directors meeting speak the truth.

OPINIONS BELOW.

The opinion of the Appellate Court of Illinois, First District (Rec. 42) is reported at 148 N. E. (2d) 600.

JURISDICTION.

The judgment of the Appellate Court of Illinois, First District was entered on January 7, 1958. (Rec. 45, 46.) A petition for leave to appeal was denied by the Supreme Court of Illinois on May 20, 1958. (Rec. 58.) The jurisdiction of this court is invoked under Title 28 U. S. C. Section 1257 (3).

QUESTION PRESENTED.

Whether the action of the defendants was in violation of the National Banking Act.

STATEMENT.

The plaintiff, Meyer Field, at the time of the suit, was a director and stockholder of the North Shore National Bank of Chicago, and had been such since 1942. The defendants, Augent R. Oberwortmann and V. W. Becking, are president and secretary of the bank respectively.

The plaintiff filed a prior suit against Oberwortmann in the Superior Court of Cook County, Illinois, to set aside a sale of bank stock to the defendant, Oberwortmann, among others, alleging business duress, and breach of a personal and business fiduciary relationship among other grounds. (14 Ill. App. (2d) 218, 144 N. E. (2d) 637.) A reading of the opinion will give this Court the background of the cause at issue.

We hope the court agrees that this is a case of prime importance. National bank directors, especially the defendant Oberwortmann who was and still is a member of the Federal Reserve Board, should be meticulous in upholding the letter and spirit of the National Banking and the Federal Reserve Acts. He should not be permitted to direct minutes of a directors' meeting to be prepared so as to

conceal pertinent facts and inquiries of improper actions. This is especially true where the controlling director who has power to squelch, is personally involved in the charges sought to be preserved in the record.

At first blush, this may seem a minor issue. It has its origin in as humble a manner as the *Dartmouth* case, in that in its inception it seemed to "involve only a small college." Nevertheless, that small case shaped the course of property rights and justice for all times and relieved the court of endless litigation which otherwise would have resulted but for that decision. If the principle of law and order locked within the cover of this case can be exploded, the released forces of equity resulting therefrom would be incalculable.

There is a direct issue here, in addition to the other questions, the question of high-handed censorship. This court of all courts has been most faithful in protecting the freedom to speak and write. Is it fair that a minority director, especially a director of a national bank, possessing substantial property rights and in the discharge of his duties as a director, be ruthlessly censored in the minutes of a corporate meeting which is the best place to preserve the record?

The courts are over crowded. Justice delayed is justice denied. Wrongdoers act with greater impunity, knowing that time is on their side. No multiplication of the number of judges can expedite the administration of justice and break the log jam of crowded calendars more than can forthright decisions by courts which can be used as guideposts to lower courts and litigants. This would enable individuals to police their own problems without resort to the courts if all parties knew where the courts stand.

The making and preserving of a record in time is the one indispensable first step. The burying of the facts is so easily accomplished today in the all powerful branches of society that the individual is submerged. A malaise of

indifference and surrender is the direct result. It requires the might and the explosive effort of a powerful congressional committee, like in the Beck and other abuses, or the notorious banking scandal committted by Orville Hodge, Auditor of Public Accounts of the State of Illinois, or the many corporation abuses, to get to the facts. Had any union member or stockholder and others, to whom many of these abuses were the matter of common knowledge, been able to make at least inquiries of record, exposure would have come much sooner. What is even more likely, many of these awesome abuses probably never would have taken place. This court is not being asked to make a finding of fact. What is sought here is the right to make a timely record of material matters to be incorporated in the minutes of a directors' meeting of a national bank.

This to us seems to be so elementary that it should be considered an insult to any court to have someone contest the issue. Justice Holmes once said one of the hardest things to do is to vindicate the obvious. Unfortunately one of the pets in this growing complex society is the banking fraternity—or so it acts and thinks. It seems that banks have a tendency to identify themselves in the press and in the courts with the public interest—you might disturb the public confidence, they say. The tendency seems to be to cover up and excuse acts done in this field that would not be so tenderly treated if done by others. There should be no sacred cows before the court of law, or elsewhere. It is all too painfully evident that the defendants have anointed themselves within the folds of that sensitive segment of the economy resulting in, as the motivation gentry would say, subconscious subliminal influence. Here is a field of law that cries out for help from this court.

On August 9, 1955, at a regular meeting of the board of directors at which the plaintiff and the defendants were present (Rec. 17), a report of an Executive Committee was

read informing the board that new counsel was retained by the bank, whereupon the plaintiff requested that the report be made a part of the minutes which was refused. The plaintiff then propounded the following question to the officers and directors of the bank:

> "Was there any commitment made with the so-called new counsel of the bank for the payment of their fees from the assets of the bank for litigation in which four of the directors were individually involved?"

The defendant Oberwortmann, ruled that the question was out of order and immediately declared the meeting adjourned.

On August 11, 1955, the plaintiff addressed a letter to the bank (Pl. Ex. 1; Rec. 13) to the attention of the defendant Becking, requesting that the minutes of meeting of August 9th be reported in full. On August 12, 1955, upon receipt of the minutes the plaintiff again wrote a letter to the bank (Pl. Ex. 2; Rec. 14) in which he demanded that the minutes be corrected.

On September 13, 1955, and again on October 11, 1955, at regular meetings of the board of directors at which the plaintiff and the defendants were present, the plaintiff addressed the attention of the meeting to the deficiencies of the minutes; moved that a stenographic record of each meeting be made and kept, and this motion failed of a second; requested that the letters of August 11th and 12th be incorporated in the minutes; asked whether the bank in hiring counsel for the bank had obligated itself to pay out of the bank's funds for any litigation expenses incurred by any individual directors, which was not answered; gave his reasons for objecting to the bank's casting its vote for the re-election of Oberwortmann as a member of the Board of Directors of the Federal Reserve Bank of Chicago; and read a statement to the directors (Pl. Ex. 3; Rec. 15) which

he moved be incorporated in the minutes, but which failed of a second.

The minutes of the meeting of August 9, 1955 (Pl. Ex. 4; Rec. 17), the meeting of September 13, 1955 (Pl. Ex. 5; Rec. 18), and the meeting of October 11, 1955 (Pl. Ex. 6; Rec. 19) are meager, scant and fail to contain a true record of the proceedings in the following particulars:

Minutes of August 9, 1955:

(a) The report of a special committee was read which reported that new counsel was appointed for the bank, yet the report was not made a part of the minutes either in whole or in part; and it does not appear in the minutes as to the name of the new attorneys or their compensation.

(b) Plaintiff asked the question: "Was there any commitment made with the so-called new bank counsel for the bank for the payment of their fees from the assets of the bank, for litigation in which four of the directors were individually involved?" The minutes failed to show that the question was asked or answered, and failed to show that the meeting was adjourned to stifle the question and any discussion thereof.

(c) Plaintiff stated to the directors that under the law such payment out of bank's funds was illegal, which statement is omitted in the meetings.

Minutes of September 13, 1955:

(a) The plaintiff made specific objections to the minutes of the meeting of August 9, 1955, and read his letters dated August 11, 1955 (Pl. Ex. 1; Rec. 13) and August 12, 1955 (Pl. Ex. 2; Rec. 14) and asked that both letters or his discussions with the board be made a part of the minutes, which was not done.

(b) The plaintiff then stated that he wished to have the minutes show that he asked whether the bank, in hiring

counsel for the bank, had obligated itself to pay out of the bank's funds for any litigation expenses incurred by any individual directors. The minutes fail to show that the question was asked or answered.

(c) Plaintiff stated that the failure to incorporate motions and statements made by a director pertaining to the bank's business is a violation of the laws pertaining to corporations, the Federal Reserve Act and the National Banking Act, which the minutes failed to show.

Minutes of October 11, 1955:

(a) The question submitted by the plaintiff at the August, September and October meetings of the Board of Directors, relating to compensation of the new attorneys, is for the first time shown in the minutes of the October meeting. However, the discussion is omitted as well as the most important aspect of the inquiry, which is the answer to the question.

(b) A motion was made and seconded that defendant, Oberwortmann, be the nominee and that the bank's vote be cast for his re-election as a Class A member of the Board of Directors of the Federal Reserve Bank of Chicago for a three year period. The minutes reflect the objection of the plaintiff, but not his reasons for the objection which were given, (1) that Obertwortmann lacked the qualifications to be entrusted with the duties of that high office of the Federal Reserve Bank where an abuse of discretion cannot readily be detected and a party injured thereby is left with inadequate remedies or none at all; and (2) that he was advised that Oberwortmann was encouraging another bank to engage in an unwise practice which would require the approval of the Federal Reserve Bank of which Oberwortmann was and is a member; that Oberwortmann could have a motive to encourage that bank to extend itself and move its location improvidently; that

Oberwortmann might be encouraging that bank to move because among other reasons, plaintiff has an interest in the bank building where that bank is now a tenant; and if true, Oberwortmann was willing to ignore the obligation of his office as a member of the Federal Reserve Bank to further his personal ambitions and to gratify a desire to do plaintiff further injury.

(c) Plaintiff recommended that Oberwortmann should be removed as President because Becking's failure to perform his duty of truly recording the minutes of the Board of Directors' meetings of August, September and October was caused and directed by Oberwortmann.

SPECIFICATIONS OF ERRORS TO BE URGED.

The Appellate Court of Illinois, First District, and the Supreme Court of Illinois, by denying leave to appeal, erred:

1. In failing to give effect to the National Banking Act in the following particulars:

   A. The directors of a national bank are bound by the provisions of 18 U. S. C. Section 1005.

   B. National bank directors are required to make reports to the Comptroller of the Currency under the provisions of 12 U. S. C. Sections 161-163.

   C. A director of a national bank is liable for assenting to a violation of the Federal Banking Laws by another director under the provisions of 12 U. S. C., Section 93.

2. In depriving plaintiff of a fundamental right to have the minutes of a national bank speak the truth.

REASONS FOR GRANTING THE WRIT.

The decision below failed to consider or give effect to the National Banking Act.

1. The minutes of a national banking institution are a statutory record required to be maintained and to be made available to all directors and stockholders upon request. When a director has reason to believe that funds of the bank may be misapplied and raises such a question at a meeting of the board of directors, it is obvious that public policy requires a full and complete recording of the facts.

In the instant case the plaintiff, acting in good faith as a director of the bank, raised the question whether certain attorneys employed by the bank would represent individually, officers and directors in a suit against them and charge the bank for these services. Obviously, if the bank paid the attorneys' fees of its officers and directors incurred in a suit brought against them as individuals, it would be misapplying the bank's funds. It would be tantamount to taking funds out of the bank and giving them directly to the directors for them to use in payment of their personal obligations.

The defendants in the instant case were obviously attempting to conceal these facts from the stockholders, bank examiners and others. They should not be permitted so to do. The people of this country have entrusted to the Federal Comptroller of Currency the supervision of all national banking institutions. This public official is empowered to examine all records of all national banks to make certain that no embezzlement or misapplication of funds is occurring. He is entitled to learn of even suspicions of such actions. Where a director of such an institution has cause to believe that misapplication of its funds is taking place and raises such question at three separate meetings of the Board of Directors, it is a fraud upon the

people of the United States to conceal such a fact, and no court in this country should sanction such a situation.

At one of the meetings involved in this suit the question arose as to the fitness of the defendant Oberwortmann to serve as a director of the Federal Reserve Bank of Chicago for a three-year period. The plaintiff pointed out at the meeting certain action taken or contemplated by this defendant designed to injure the North Shore National Bank. The plaintiff felt that a bank official who sanctioned the falsification of bank records was not qualified for such an office. All reference to these statements was omitted from the record.

During the past year the State of Illinois has been the scene of great scandals in the office of Public Auditor and in the business administration affairs of several banks in Chicago. A good portion of the mischief could have been avoided if persons charged with ministerial duties had faithfully kept their records so that an examination would have revealed shortcomings in the public office or in the business administration of the banks.

A question asked at a meeting of the Board of Directors, even though it receives no answer, is entitled to proper record, so that others not attending that meeting may be put on notice. We have here far more than a private dispute between the plaintiff and the defendants. This case goes to the heart of the entire National system of the control of banks.

2. Title 12 U. S. C. A. Section 93 makes a director of a national bank liable for assenting to a violation of the Federal Banking Laws by another director in these words:

> "* * * every director who participated in or assented to the same (violation of any of the provisions of the National Banking Act) shall be held liable in his personal and individual capacity for all damages which the association, its shareholders, or any other person, shall have sustained in consequence of such violation."

In *Yates* v. *Jones National Bank*, 206 U. S. 158, a writ of error was prosecuted to secure the reversal of a judgment of the Supreme Court of Nebraska. One of the contentions made was that the civil liability of directors of a national bank is governed by the common law regardless of the provisions of the National Banking Act. The Supreme Court overruled this contention and cited and construed Section 5239 of the U. S. Revised Statutes (now Title 12 U. S. C. A. Section 93) and said (at page 178):

> "And general consideration as to the spirit and intent of the national bank act (*Easton* v. *Iowa*, 188 U. S. 220; *Davis* v. *Elmira Savings Bank*, 161 U. S. 275) also render necessary the conclusion that the measure of responsibility, concerning the violation by directors of express commands of the national bank act, is in the nature of things exclusively governed by the specific provisions on the subject contained in that act. Thus, a contrary conclusion would lead to a varying measure of responsibility, in the several States in which the question of liability might arise, depending upon the conceptions of the state courts of last resort as to the meaning of the act of Congress imposing the duty. Hence, it would follow that the same provision of the statute might mean one thing in one State and a different thing in another."

In a later appeal in the same case, *Jones National Bank* v. *Yates*, 240 U. S. 541, this court held that construction of the National Banking Act was sufficiently involved, although not specifically raised in the State court, to warrant allowance of certiorari. This court said regarding the directors of the bank (pages 562-563):

> "It was plainly permissible, despite their disclaimers and denials, to attribute to these directors the knowledge which men of ordinary intelligence would readily have obtained with respect to the financial condition of the bank in the course of the supervision which they professed to be actively exercising. Assuming that they were ignorant of the frauds that had been com-

> mitted and concealed by falsified entries, there was warrant for the conclusion that they could not have failed to acquire sufficient information to be aware that the representations in the official reports of the latter part of the year 1892 were materially false and calculated to deceive."

In *Bowerman* v. *Hamner*, 250 U. S. 504, a suit was instituted against a director of a national bank for damages because of unlawful and negligent management. It was alleged that he failed to attend directors' meetings and examine the books and papers of the bank, and thus failed to exercise proper supervision of the affairs of the bank. This court stated principles which are applicable herein and need restating (pages 509-510):

> "Without going more into the details, there can be no doubt that the business of the bank was surrendered wholly to the president and cashier, and was grossly mismanaged after January, 1910, in utter disregard of the national banking laws and of the by-laws of the association, and that this mismanagement was of such a character that even slight care in the discharge of his duties as a director must have led Bowerman, an experienced banker, to discover the trend of the management and to have prevented the greater part, if not all, of the losses which resulted in the failure."

and said at page 512:

> "'In an earlier case, *Martin* v. *Webb*, 110 U. S. 7, it was said:
>
> 'Directors cannot, in justice to those who deal with the bank, shut their eyes to what is going on around them. It is their duty to use ordinary diligence in ascertaining the condition of its business and to exercise reasonable control and supervision of its officers. They have something more to do than, from time to time, to elect the officers of the bank, and to make declarations of dividends. That which they ought, by proper diligence, to have known as to the general course of business in the bank, they may be presumed

> to have known in any contest between the corporation and those who are justified by the circumstances in dealing with its officers upon the basis of that course of business.'"

again at page 513:

> "That ordinarily prudent and diligent men, accepting election to membership in a bank directorate, would not wilfully absent themselves from directors' meetings for years together as Bowerman did cannot be doubted; that a director who never makes, or causes to be made any examination whatever of the books or papers of the bank to determine its condition and the way in which it is being conducted, does not exercise ordinary care and prudence in the management of the affairs of the bank is equally clear, and that Bowerman, when guilty of neglect in both of these respects, did not exercise the diligence which prudent men would usually exercise in ascertaining the condition of the business of the bank or a reasonable control and supervision over its affairs and officers is likewise beyond discussion. He cannot be shielded from liability because of want of knowledge of wrong-doing on his part, since that ignorance was the result of gross inattention in the discharge of his voluntarily assumed and sworn duty."

The record in the instant case shows that at three separate meetings of the Board of Directors motions, reports and discussions were deliberately omitted from the minutes of the meeting.

The minutes of the meeting of September 13, 1955, show the absolute and highhanded control exercised by Oberwortmann over the directors. They show that "a motion was made by C. D. Oberwortmann, seconded by N. R. Oberwortmann and passed, that the motion made by Meyer Field to appoint a stenographer or court reporter to take the minutes of the directors meetings be stricken from the minutes." (Ex. 5; Rec. 18.) The defendants were appar-

ently attempting to conceal the matter discussed at the meeting from the bank examiners, stockholders and others.

Where a director of a national bank may wish to have himself individually on record, his discussion and reasons become equally important to his vote. The directors of the corporation stand in a fiduciary relation which requires them to exercise the utmost good faith in managing the business affairs of the company and in preparing their minutes. So where, as in the case at bar, the secretary fails to record the plaintiff's request that a report of the Executive Committee be made a part of the minutes, fails to show that a director asked a pertinent question regarding the payment of fees of new counsel, fails to record the answer to the question, fails to record the name of the counsel, fails to show that letters were addressed to the bank concerning the deficiency of the minutes, fails to show the reasons given by a director for objection to the bank casting its vote for the re-election of the president and director of the bank as a member of the Board of Directors of the Federal Reserve Bank of Chicago, then the remedy of mandamus is clearly appropriate.

The directors of a national bank are bound by the provisions of Title 18, Section 1005 of the U. S. Code Annotated which provides:

> "Whoever makes any false entry in any book, report, or statement of * * * (any national bank) * * * with intent to injure or defraud such bank, or any other company, body politic or corporate, or any individual person or to deceive any officer of such bank, or the Comptroller of the Currency, or the Federal Deposit Insurance Corporation or any agent or examiner appointed to examine the affairs of such bank, or the Board of Governors of the Federal Reserve System * * * shall be fined not more than $5,000 or imprisoned not more than 5 years or both." (This Section was formerly contained in Title 12, Section 592, of the U. S. C. A.)

National Bank Directors are required to make reports to the Comptroller of the Currency, 12 U. S. C. A. Sections 161-164, and their liability for false entries is not restricted to reports required by the above sections of the Code but includes all reports made in the due course of their business.

In *Lewis* v. *United States*, 22 Fed. 2d 760, the Circuit Court of Appeals of the 8th Circuit held that a prosecution for false entries in the minute books of a national bank was proper against two officers of the bank who exercised complete control over the board of directors. The board of directors had been selected by them, held no meetings and exercised no supervision over the institution. The appellants were charged with obtaining for their personal use several hundred thousand dollars of the money of the bank by procuring third parties to execute notes, the proceeds of which came to and were used by the appellants, which notes were wholly worthless. The bank was rendered insolvent. In order to deceive the bank examiners and to convey the impression that the notes had been examined by the discount committee and approved by the board of directors, appellants caused pretended minutes or purported minutes of the board to be written up and signed. In such minutes, pretended reports of a discount committee and approval of such reports by the board were cited. As a matter of fact, the bank had no acting discount committee and held no meetings of the board of directors at the time and for the purposes stated in these minutes.

The appellants objected that minute books are not books as contemplated by the statute. However, the court said (page 764):

> "We think the statute broadly covers all books, entries in which are calculated to deceive the Comptroller of the Currency and the officers of the bank. These minute books were most important under the circumstances of the case."

In the case at bar, the petition for mandamus to make the minutes speak the truth should be allowed so that the directors may avoid possible penal liabilities for false entries in such minutes. A failure to make a full statement in a report of a meeting which purports to be complete is just as false as an actual misstatement in such a report.

If a director cannot have pertinent questions or a summary of reasons for his vote reflected in the minutes, he might as well be absent.

The minutes of October 11, 1955, show that the plaintiff objected to the motion that "N. R. Oberwortmann be the nominee and that the bank's vote be cast for his reelection as Class A Group 2 member of the Board of Directors of the Federal Reserve Bank of Chicago." (Ex. 6; Rec. 19.) The Comptroller of the Currency, no less than the many authorities cited by the petitioner herein, confirm the right of the plaintiff to have an appropriate summary of his reasons for so voting placed in the minutes. A summary of the discussion is equally important to the vote.

Likewise, the granting of the writ here will have a salutary effect upon banks and bank directors as a timely reminder by this Court that a meeting of directors is more than a mere formality and the minutes more than a skeleton defined by an autocratic bank president. Although the questions and statements of an independent bank director may be unpopular to the vested interests in control of a bank, yet an appropriate summary thereof should be recorded in the minutes. Otherwise how would a bank examiner or other interested persons detect an abuse of power?

On January 18, 1956, in reply to the request of the plaintiff for his opinion on the question, R. M. Gidney, Comptroller of the Currency, wrote, "we concur with you, of course, that a director has every right to request that an

accurate record be maintained of how he votes on specific motions and an appropriate summary of his reasons for so voting."

To sanction defendants' conduct in this case under the facts as alleged in the Complaint and admitted by the defendant's motion to dismiss, is to reduce the solemn and important methods and functions of corporation directors' meeting to the level of a kangaroo court by arbitrary and reckless directors. It would open the flood gates of corporate abuses by those "who have the heart to resolve, the head to deceive, and the hand to execute any corporate mischief."

CONCLUSION.

For the reasons stated, this petition for writ of certiorari should be granted.

Respectfully submitted,

MEYER FIELD, *pro se* and
LEONARD L. COWAN,
Counsel for Petitioners.